

United Food and Commercial Workers District Union Local One, AFL-CIO, CLC (Big V Supermarkets, Inc.) and Marshall Malysz. Case 3-CB-5326

August 28, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On April 14, 1989, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge recommended dismissal of the complaint alleging that the Respondent violated Section 8(b)(1)(A) of the Act when it refused to honor revocations of members' checkoff authorizations for deductions paid to the Union's Organizing Defense Campaign (ODC). Contrary to the judge, we find that the Respondent violated Section 8(b)(1)(A) by refusing to agree to the requests by Charging Party Malysz and his 18 fellow employees to revoke their dues-checkoff authorizations insofar as they might apply to the ODC payment.

It is undisputed that the checkoff authorizations executed by the employees had no limitations whatsoever on revocation.¹ Those authorizations read, in pertinent part, as follows:

I hereby authorize my employer to deduct in whole or in part from my earnings each week or month all union initiation fees, dues and assessment for which I may be indebted. . . .

It is also undisputed that the Respondent conveyed its request to the Employer for the deduction of the ODC payments in the following terms (emphasis in original):

Please be advised that on March 28, 1988 the membership of the United Food and Commercial

Workers District Union Local One approved an assessment which represents one hour's pay per month per member.

Please establish a system by which these assessments can be deducted from your employees['] paycheck during the second week of each month. This system should go into effect *immediately*.

The Respondent sent monthly billing statements to the Employer regarding checked-off amounts it asked to have transmitted to it. In these statements, it identified the ODC payment as a separate payment for its ODC "Fund."

On these facts, the General Counsel made two alternative arguments for finding a violation of Section 8(b)(1)(A). He argued that the payments were assessments, as opposed to an increase in periodic dues, and that the Respondent would be obligated to honor a revocation of checkoff authorization for the payments on that ground alone. Alternatively he argued that, regardless whether the payments constituted dues or an assessment, the fact that the authorizations contained no limits on revocability meant that the employees were free to revoke at will, either in whole or in part. The Respondent's failure to honor partial revocations violated Section 8(b)(1)(A), he maintained.

The judge rejected the first argument because, in reliance on *Detroit Mailers No. 40 (Detroit Publishers Assn.)*, 192 NLRB 951, 952 (1971), he concluded that the payments constituted a dues increase rather than an assessment. As to the second argument, although the judge agreed that, in the absence of revocability limitations in the authorizations, the employees were free to revoke at will, he concluded that such revocations must be either all or nothing, i.e., that an authorization signer who was also a union member could not, as the employee/members did here, revoke the authorization as to the ODC payments and leave it in place as to general dues. The judge reached this latter conclusion because he feared that any holding that partial revocations must be allowed "could result in extensive and onerous collection procedures imposed on the Union." He foresaw a "possibility for chaos" as employee/members designated widely varying percentages of their dues for deduction by checkoff.

We do not reach the issue whether the ODC payments constituted periodic dues or an assessment,² but find for the General Counsel on the second theory. In so doing we see no necessity, given the facts of this case, for opening the door to the chaos feared by the judge. As the Respondent's own letter, quoted above, makes clear, the Respondent envisioned the ODC pay-

¹ We agree with the General Counsel that it is immaterial whether limitations were included in the collective-bargaining agreement. It is only the language of the authorization itself that binds an employee. *Trico Products Corp.*, 238 NLRB 1306, 1309 (1978). Although the statement in *Trico* that "[c]heckoff authorizations are contracts between the employer and the employee" represents a view rejected by the Board in *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322, 327-328 (1991), we regard as still good law the proposition that applicable revocability limitations must be found in the authorization itself.

² This is a difficult question. On the one hand, the Supreme Court in *Communications Workers v. Beck*, 487 U.S. 735, 752-753 fn. 7 (1988), implicitly disapproved *Detroit Mailers*, supra. On the other hand, *Beck* concerned employees who were not union members, while here the employees are members.

ment as a distinct payment that called for its own separate deduction "system." It was termed an "assessment"; it was to be deducted during 1 week of the month (as opposed to the weekly dues deductions); the amount for each employee was to be based on what he would earn in 1 hour (as opposed to the fixed amounts for dues deductions); and it had its own separate column on the pay statement. The Respondent's checkoff-billing statements sent to employers also treated it separately. Having defined the ODC payment as a clearly separable part of employee/member financial obligations, the Respondent is hardly in a position to complain that it will suffer a heavy burden if it must separate it out from dues payments for purposes of the mechanics of collection.

Because we see nothing in the checkoff authorization signed by the unit employees that clearly forbids the partial revocations at issue here, and because we cannot agree that requiring the Respondent to honor those revocations is so destabilizing as to be at odds with the checkoff scheme authorized by Congress in Section 302(c)(4) of the Taft-Hartley Act,³ we find that the Respondent violated Section 8(b)(1)(A) by refusing to honor them.

ORDER

The National Labor Relations Board orders that the Respondent, United Food and Commercial Workers District Union Local One, AFL-CIO, CLC, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to give full force and effect to the ODC checkoff revocations executed by employees.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reimburse employees who have executed ODC checkoff revocations for all ODC payments withheld since the revocations with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Post at the Respondent's offices and meeting halls copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous

places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and mail sufficient copies of the notice to the Regional Director for Region 3 for posting by Big V Supermarkets, Inc., if it is willing, in all locations where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER DEVANEY, concurring.

I concur in the result reached by my colleagues.

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to give full force and effect to Organizing Defense Fund (ODC) checkoff revocations executed by members.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse employees who have executed ODC checkoff revocations for the payments unlawfully withheld, with interest.

UNITED FOOD AND COMMERCIAL
WORKERS DISTRICT UNION LOCAL ONE,
AFL-CIO, CLC

Robert A. Ellison, Esq., for the General Counsel.

Gene M. Szuflika, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Albany, New York, on February 23, 1989. The charge was filed on July 25, 1988, and an amended charge was filed on October 12, 1988.¹ The complaint was issued on October 6, 1988.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following³

³ See *Lockheed*, supra at 325 fn. 12, for a discussion of the legislative history of Sec. 302(c)(4) suggesting that dues-checkoff systems were envisioned as a way of minimizing administrative burdens on employers and unions with respect to the collection of dues.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ All dates are in 1988 unless otherwise indicated.

² The General Counsel's unopposed motion to correct the transcript contained in his brief is hereby granted.

³ It appears that the Union inadvertently neglected to offer into evidence its exhibits 4 and 5. I hereby grant its posttrial motion to receive these exhibits which were referred to by the witnesses and which were made available to

Continued

FINDINGS OF FACT

I. JURISDICTION

It is admitted and I find that Big V Supermarkets is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Union herein is actually a successor to the Amalgamated Meat Cutters Butcher Warehousemen & Affiliated Crafts of North America. Big V has had a collective-bargaining relationship with the predecessor and with the Respondent (as successor), since 1967. The most recent contract between the Respondent and Big V runs from February 16, 1987, to August 19, 1989. That contract which covers Big V's employees in its meat, fish, and appetizer departments, contains a standard union-security clause requiring union membership after 31 days of employment. It also contains a dues-checkoff clause which reads as follows:

Upon receipt of proper written authorization from any employee, the Company agrees to deduct from the wages of said employee dues, initiation fees and assessments as listed by the Union, in duplicate schedules, which will be furnished to the Company during the week preceding that in which the deduction is to be made. It is understood that any authorization for payroll deduction shall be voluntary on the part of the employee and may be cancelled at yearly intervals or at the termination date of this agreement.

The Charging Party, Marshall Malysz, has been for many years a member in good standing in the Union and had been employed by Big V since about 1973. He has never attempted to resign his membership in the Union. He like other employees covered by the Union's contracts, signed an authorization card which, in pertinent part, states as follows:

I hereby authorize my employer to deduct in whole or in part from my earnings each week or month all union initiation fees, dues and assessment for which I may be indebted

The Union has its principal offices in Utica, New York. It represents about 40,000 employees in a wide variety of occupations. It has contracts with over 400 employers other than Big V.

Prior to March 1988, the Union had a dues structure which required \$5.75 per week from all members who were full-time employees and \$4.60 from all members who were part-time employees. Apart from initiation fees and dues, the Union's members may also elect to pay, on a voluntary basis, moneys to a credit union or to a political action fund. In either case, a member can, if he chooses, elect to have moneys for the credit union and/or the political action fund deducted from his wages and remitted to the Union by his employer. In such cases, moneys for those purposes are segregated and do not go into the Union's general funds.

all parties during the trial. I also note that there is no dispute as to their authenticity.

In early 1988, the Union decided that it needed to intensify its efforts to organize nonunion employers in its area. This effort was to be called the Organizing Defence Campaign (ODC). In conjunction therewith, the Union's executive board passed a resolution on February 7, 1988, stating in part:

[T]he Executive Board recommends that effective April 1, 1988, all members will pay the equivalent of one hour's pay per month in addition to the payment of the regular dues.

IT IS FURTHER RESOLVED, that the union is authorized to conduct a vote by secret ballot for the purpose of obtaining the approval of the membership on the foregoing, and that the Union's officers are given the authority to take such actions as are necessary to conduct a vote in accordance with the bylaws of the Union.

IT IS FURTHER RESOLVED, that no general dues increases will be instituted during a five year period commencing on the date of the UFCW International Union Second Regular Convention being held on July 24, 1988 and covering the period through the following International Convention to be held in 1992.

Preliminary to the proposed vote, the Union distributed written materials regarding the issue. In the spring a notice signed by the Union's president was posted at Big V which explained the Union's need to intensify its organizational efforts and explained why those efforts would cost more money. The membership was told that the proposal was for payments from each member in the amount equal to 1 hour's pay per month which would be separately deducted from the employee's pay for the ODC.

In March 1988, the Union held a series of meetings amongst its members where secret-ballot elections were conducted as to the payment question. Malysz attended one of these meetings. At the end of each meeting the ballot boxes were closed and the count was ultimately held on March 28. The tally showed that 3983 were in favor of the added payments, whereas 2207 were opposed.

On March 29, the Union wrote to the contracting employers stating that the membership had approved the proposed new payments. In part, the letter signed by S. J. Talrico Jr., its administrator of internal operations stated:

Please be advised that on March 28, 1988 the membership of the United Food and Commercial Workers District Union Local One approved an assessment which represents one hour's pay per month for each member.

Please establish a system by which these assessments can be deducted from your employees paycheck during the second week of each month. This system should go into effect *immediately*.

On April 22, Malysz sent a letter to the employer a copy of which was forwarded to the Union on April 27. This letter stated:

I am sending this notification to bring to your attention that without my specific authorization, there are to be no new deductions from my paycheck, as of this date. Please keep this notice on file.

Also forwarded to the Union on April 27 was a petition signed by 19 of Big V's bargaining unit employees which stated;

We the undersigned, as associates of Big V and members of Local 1, do not authorize the Big V payroll department to take an additional monthly deduction for the Local 1 Organizing Defense Campaign. There is a question as to the legality of this mandatory deduction versus voluntary with the New York State Attorney General's office, which was contacted by many of our members.

Notwithstanding the letter from Malysz and the aforementioned petition, the company has deducted and remitted to the Union at the same times that it remits dues, the additional amounts for the ODC from the wages of its bargaining unit employees (including Malysz and the employees who signed the petition). In the case of Big V, the company has designated the additional amount as an assessment and has set up a new column in its pay statement to reflect that characterization. Because payments to the ODC are based on a percentage of each employee's pay, it took some time for Big V (and presumably other employers), to change their computer programs to determine these amounts. As of the time of this hearing, the Union had not yet finished changing its billing procedure and has relied essentially on the honesty and good faith of contracting employers to make the proper deductions.

Testimony by the Union's witnesses shows that the moneys collected for the ODC have gone into the general treasury of the Union and have not been segregated as in the case of the moneys deducted for the credit union or the political action fund. The evidence also shows that the ODC money has been used by the Union for all general purposes, including administrative costs, organizing expenses, community campaigns, medical screening programs, scholarship programs, and collective bargaining. Since the inception of the ODC, the Union has been able to employ 12 new full-time membership service representatives, whose functions are similar to those of business agents.

III. ANALYSIS

The General Counsel argues that the moneys deducted and paid to the Union for the ODC, constitute an assessment and not an increase in the Union's periodic dues. He contends that even though the checkoff authorization signed by Malysz and other members authorizes the deduction of assessments in addition to dues, the checkoff authorization itself (unlike the collective-bargaining agreement), contains no restrictions as to revocation, and therefore is revocable at will.⁴ He then asserts that being revocable at will, a member such as Malysz could therefore revoke the authorization as to that portion which comprised an assessment which unlike dues cannot be made a condition of continued employment.

⁴In *Trico Products Corp.*, 238 NLRB 1306, 1309 (1978), the Board held that the employer's refusal to honor checkoff revocations was unlawful even though the collective-bargaining agreement stated that the dues-checkoff authorizations were not to be irrevocable for a period of more than 1 year or beyond the termination date of the contract whichever occurred first. The Board noted that the key fact was that the authorization cards signed by the employees did not contain any limitation on their revocability and therefore were revocable at will.

Newspaper Guild Local 82 (Seattle Times), 289 NLRB 902 (1988). Therefore, according to the General Counsel, when the employer continued to deduct the ODC payments from Malysz' wages after he had revoked his authorization to have such payments deducted, and when the Union continued to accept such deductions, the Union violated Section 8(b)(1)(A) of the Act. (Presumably the only reason that the employer also was not alleged to have violated Section 8(a)(1) and (2) of the Act is because no unfair labor practice charge was filed against it.)

Alternatively, the General Counsel contends that even if the ODC payments are not construed as an assessment but rather as dues, the checkoff authorization being revocable at will, can be revocable in part. That is, the General Counsel contends that a member signing a revocable checkoff authorization may opt to pay part of his dues by checkoff and part on his own. In this case, the General Counsel argues that this would impose no undue burden as the ODC moneys, even if defined as dues, constitute a separately defined amount.⁵

The Union argues that the ODC payments constitute merely an increase in the periodic dues uniformly required of members which are therefore properly deductible from wages pursuant to an executed dues-checkoff authorization. It contends that if employee/members seek to revoke their dues-checkoff authorizations that is their business and such revocations will be honored. On the other hand, it maintains that it need not give effect to partial revocations and that employees can either elect to have their dues checked off or pay them directly. It is the Union's contention that it need not, on pain of violating the law, allow employees to do both.

The initial question therefore is whether the ODC payments should be construed as an assessment or as an increase in dues. In this respect, the court in *NLRB v. Food Fair Stores*, 307 F.2d 3 (3d Cir. 1962), stated:

It is clear that the term "periodic dues" in the usual and ordinary sense means the regular payments imposed for the benefits to be derived from the membership to be made at fixed intervals for the maintenance of the organization. An assessment on the other hand, is a charge levied on each member in the nature of a tax or some other burden for a special purpose, not having the character of being susceptible of anticipation as a regularly recurring obligation as in the case of "periodic dues."

The fact that the payments in question are to be based on a percentage of the employees' earnings rather than being a fixed amount for each employee does not detract from the payments being defined as uniformly required dues. *Local 409 IATSE (RCA Service Co.)*, 140 NLRB 759, 764 (1963). Nor is it necessary to delve very far into the purpose of the payments in order to describe them as dues. As noted by the Board in *Detroit Mailers No. 40 (Detroit Publishers Assn.)*, 192 NLRB 951, 952 (1971):

Section 8(a)(3) authorizes a union to require all employees whom it represents and who are covered by a

⁵I note that Malysz never resigned his membership in the Union. As such he cannot, as might a financial core member, that he objects to part of his dues going for purposes other than collective bargaining. To that extent, therefore, the decision in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), is irrelevant.

valid union-security agreement to pay all “periodic dues . . . uniformly required as a condition of acquiring or retaining [union] membership.” Neither on its face nor in the congressional purpose behind this provision can any warrant be found for making any distinction here between dues which may be allocated for collective-bargaining purposes and those earmarked for institutional expenses of the union. As recognized by the Supreme Court in the *Schermerhorn* case, [373 U.S. 746], “dues collected from members may be used for a ‘variety of purposes, in addition to meeting the union’s costs of collective bargaining. . . . By virtue of Section 8(a)(3), such dues may be required from an employee under a union-security contract so long as they are periodic and uniformly required and are not devoted to a purpose which would make their mandatory extraction otherwise inimical to public policy.

In this case the evidence convinces me that the ODC payments authorized by secret-ballot vote of the Union’s membership in March 1988 constitutes an increase in dues and not an assessment. The fact that Big V described this money as being an assessment and the fact that in a letter dated March 29, a union official also described it as an assessment, does not mean that it is an assessment from a legal point of view. See *Local 409 IATSE*, supra at 764. On the contrary, the record establishes that these payments have all the hallmarks of periodic and uniformly required dues. Thus, they are paid on a regular basis on a uniformly determined percentage of each employee’s wages, and are remitted along with regular dues to be deposited in the Union’s general treasury unsegregated from its other funds. The money was and is earmarked for organization activities and also for general administrative and other expenses. The evidence shows that the decision to require these additional payments was not intended to be a temporary measure, but rather was implemented as a permanent part of the Union’s overall dues structure, with an assurance given to its members that if they voted for these payments there would be no other dues increases for at least the next 5 years.

Notwithstanding my conclusion that the ODC payments constituted merely an increase in dues rather than an assessment, the General Counsel would still argue that members could nevertheless partially revoke their dues-checkoff authorizations if such authorizations were revocable at will. I do not agree.

Dues-checkoff authorizations are voluntary and pursuant to Section 302 of the Act, constitute one of the exceptions to the prohibitions on employer payments to unions or their agents. Congress specifically provided that dues-checkoff authorizations must be voluntarily executed by employees, in a writing “which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.” The purpose of allowing such deductions and payments was for a union’s administrative convenience thereby eliminating the time and expense of making individual periodic (usually

monthly), collections from its members. At the same time, such a system does provide a benefit to employees as it effectively eliminates the possibility that employees covered by valid union-security agreements will risk discharge as a result of late or partial dues payments.⁶ Of course such a risk is one which the law allows an employee/member to take.

It seems to me that if the Board were to require union’s as a result of this case, to honor partial revocations of dues-checkoff authorizations, it could result in undermining the utility of these authorizations. This Union has over 40,000 members and if even a small percentage of those members decided to change their mode of dues payments this could result in extensive and onerous collection procedures imposed on the Union. For example one could imagine the possibility for chaos if some of the members decided to have 50 percent of their dues deducted and 50 percent to be paid directly, while other members decided to have 20, 30, 67, or 85 percent of their dues paid by dues deductions. Assuming that such a situation evolved, even to a limited extent, the possibility of late payments, the possibility of partial payments, and the need to expend time and money to monitor such a situation would in my opinion be onerous. In this respect I agree with the Union, that the better answer is to allow a union to say to an employee who wants to revoke his dues-checkoff authorization; either revoke it totally or don’t revoke it at all, but in either case we will honor your decision.

As the General Counsel has cited no authority for the proposition that a Union will violate the Act by failing to honor a member’s partial revocation of his dues-checkoff authorization, and as I see no basis for such a conclusion, I shall recommend that the Board find that the Union has not violated the Act.

CONCLUSION OF LAW

The Union has not engaged in any unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

⁶Union’s having valid union-security clauses in collective-bargaining agreements may in certain circumstances cause an employer to discharge an employee who makes a belated tender of dues. *General Motors*, 134 NLRB 1107, (1961). Similarly, a union need not accept partial dues payments. *Acme Fast Freight*, 134 NLRB 1131 (1961).